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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-11

JAMES R. JAMES, Judicial Administrator, and
THE STATE OF KANSAS,
Appellants,

vs.

DAVID E. STRANGE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

INTRODUCTION

Appellants appeal from the judgment of the United States District Court for the District of Kansas, entered on April 19, 1971, enjoining the enforcement of K.S.A. 1970 Supp. 22-4513 upon the conclusion that said statute violates the constitutional right to counsel of indigent defendants protected by the Sixth and Fourteenth Amendments to the United States Constitution. This statement is submitted to support the conclusion that this Court has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the United States District Court for the District of Kansas is reported at 323 F.Supp. 1230 (1971). A copy of the opinion, containing the District Court's conclusions of law and judgment is attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

This suit was brought pursuant to 28 U.S.C. § 2281, to enjoin the enforcement, operation and execution of a statute of the State of Kansas, K.S.A. 1970 Supp. 22-4513, as being in conflict with the Sixth and Fourteenth Amendments of the Constitution of the United States. A judgment of a three-judge district court was entered on April 19, 1971, granting appellee Strange the relief he requested, declaring the above-referenced statute unconstitutional and enjoining its future enforcement. Notice of appeal was filed in the United States District Court for the District of Kansas on May 3, 1971.

Jurisdiction of this Court to review the decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b).

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *Florida Lime and Avocado Growers v. Jacobsen*, 362 U.S. 73, 75-77, 85 (1960); *Rorick v. Board of Commissioners of Everglades Drainage District*, 307 U.S. 208, 212 (1939); *Mayhue's Super Liquor Store, Inc. v. Meiklejohn*, 426 F.2d 142, 144-45 (5th Cir. 1970).

STATUTE INVOLVED

K.S.A. 1970 Supp. 22-4513, the validity of which was challenged in the district court reads as follows:

"(a) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by section 10 [62-3110], such defendant shall be liable to the state of Kansas for a sum equal to such expenditure, and such sum may be recovered from the defendant by the state of Kansas for the benefit of the fund to aid indigent defendants. Within thirty (30) days after such expenditure, the judicial administrator shall send a notice by certified mail to the person on whose behalf such expenditure was made, which notice shall state the amount of the expenditure and shall demand that the defendant pay said sum to the state of Kansas for the benefit of the fund to aid indigent defendants within sixty (60) days after receipt of such notice. The notice shall state that such sum became due on the date of the expenditure and the sum demanded will bear interest at six percent (6%) per annum from the due date until paid. Failure to receive any such notice shall not relieve the person to whom it is addressed from the payment of the sum claimed and any interest due thereon.

Should the sum demanded remain unpaid at the expiration of sixty (60) days after mailing the notice, the judicial administrator shall certify an abstract of the total amount of the unpaid demand and interest thereon to the clerk of the district court of the county in which counsel was appointed or the expenditure authorized by the court, and such clerk shall enter the total amount thereof on his judgment docket and said total amount, together with the interest thereon at the rate of six percent (6%) per annum, from the date of the expenditure thereof until paid, shall become a judgment in the same manner and to the same extent as any other judgment under the code of civil pro-

cedure and shall become a lien on real estate from and after the time of filing thereof. A transcript of said judgment may be filed in another county and become a lien upon real estate, located in such county, in the same manner as is provided in case of other judgments. Execution, garnishment, or other proceedings in aid of execution may issue within the county, or to any other county, on said judgment in like manner as on judgments under the code of civil procedure. None of the exemptions provided for in the code of civil procedure shall apply to any such judgment, but no such judgment shall be levied against a homestead. If execution shall not be sued out within five (5) years from the date of the entry of any such judgment, or if five (5) years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant and shall cease to operate as a lien on real estate of the judgment debtor. Such dormant judgment may be revived in like manner as dormant judgments under the code of civil procedure.

(b) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by section 10 [62-3110], a sum equal to such expenditure may be recovered by the state of Kansas for the benefit of the aid to indigent defendants fund from any persons to whom the indigent defendant shall have transferred any of his property without adequate monetary consideration after the commission of the alleged crime, to the extent of the value of such transfer, and such persons are hereby made liable to reimburse the state of Kansas for such expenditures with interest at six percent (6%) per annum. Any action to recover judgment for such expenditures shall be prosecuted by the attorney general, who may require the assistance of the county attorney of the county in which the action is to be filed, and such action shall be governed by the provisions

of the code of civil procedure relating to actions for the recovery of money. No action shall be brought against any person under the provisions of this section to recover for sums expended on behalf of an indigent defendant, unless such action shall have been filed within two (2) years after the date of the expenditure from the fund to aid indigent defendants."

QUESTION INVOLVED

1. Whether the existence of a state statutory procedure providing for the collection from an indigent defendant of moneys expended by the State to furnish him counsel constitutes an unlawful burden upon an indigent defendant's Sixth Amendment right to the assistance of counsel.

STATEMENT OF THE CASE

This case was presented to the three-judge court upon a stipulated statement of facts, set out in Document No. 8 of the record. Briefly, David Strange, a resident of Shawnee County, Kansas, was charged on July 2, 1969, with the felony offense of first degree robbery (in violation of K.S.A. 21-527) in the Magistrate Court of Shawnee County, Kansas. (Doc. # 8, ¶ 1) Mr. Strange was arrested on that date and brought before the Magistrate Court for arraignment. (Doc. # 8, ¶ 2) The Magistrate Court judge on that date advised Strange of his right to counsel, and then continued the matter until July 10, 1969, when Strange advised the Court that he was contemplating arrangements for the retention of counsel through the aid of sisters and brothers. (Doc. # 8, ¶ 3, 4) On July 10, 1969, the Magistrate Court found Strange indigent and at his request appointed counsel pursuant to state law. (Doc. # 8, ¶ 5) Thereafter, court-appointed counsel, John E. Wilkinson of Topeka,

Kansas, represented Strange during a criminal proceeding until, after being fully advised by counsel, Strange entered a plea of guilty to a reduced charge of unlawfully, feloniously and willfully taking from the person of another personal property in violation of K.S.A. 21-2422. (Doc. # 8, ¶ 11, 12) Mr. Strange was subsequently placed on probation on August 22, 1969, by the District Court of Shawnee County, Kansas. (Doc. # 8, ¶ 13)

Mr. Wilkinson, the court-appointed counsel for Mr. Strange, then submitted vouchers to the judicial administrator of the state of Kansas pursuant to the Kansas Aid to Indigent Defendants Act in order to secure compensation from the state for the duties performed. In December of 1969 the Indigent Defender's Fund, established by L. 1969, Ch. 291, paid \$500 to Mr. Wilkinson for his representation of Strange in the state criminal proceeding pursuant to K.S.A. 1970 Supp. 22-4507.

On December 9, pursuant to K.S.A. 1970 Supp. 22-4513, the judicial administrator of the State of Kansas sent by certified mail a notice requesting payment of the sum of \$500 by Mr. Strange. A judgment was not taken against Mr. Strange pursuant to the provisions of K.S.A. 1970 Supp. 22-4513 because a temporary restraining order, later replaced by a temporary injunction, was entered by the district court prohibiting the judicial administrator from further proceeding under the provisions of K.S.A. 22-4513. That injunction was made permanent by the district court's decision reflected in the Journal Entry of Judgment of April 19, 1971. The district court concluded that the provisions of K.S.A. 1970 Supp. 22-4513 had a "chilling" effect on the exercise of an indigent defendant's federal constitutional right to counsel provided by the Sixth and Fourteenth Amendments to the United States Constitution, and therefore declared the state statute unconstitutional and enjoined its further enforcement. This appeal followed.

THE QUESTION IS SUBSTANTIAL

The challenged state statute, K.S.A. 1970 Supp. 22-4513, is a portion of an "Aid to Indigent Defendants Act" enacted by the 1969 Session of the Kansas Legislature. See L. 1969, Ch. 291, §§ 1-15. That act was adopted in an attempt by the Kansas Legislature to fully implement the requirements set out in this Court's decision of *Gideon v. Wainwright*, 372 U.S. 335 (1963), and subsequent pronouncements on the subject of right to counsel for indigents. The State of Kansas had been one of those states which for many years had provided for the appointment of counsel in indigent cases. See G.S. 1868, Ch. 82, § 160; R.S. 1923, § 62-1304; L. 1941, Ch. 291, § 1; G.S. 1949, § 62-1304. The statutory scheme adopted by the 1970 Legislature provided for systematic compensation of the attorneys who were appointed in indigent cases (K.S.A. 1970 Supp. 22-4507), both at the trial and appellate level, as well as for compensation paid on behalf of the indigent defendants for procedural necessities such as transcripts and court documents (see K.S.A. 1970 Supp. 22-4505, 4506, 4509, or even such assistance as that provided by expert witnesses or investigators. (K.S.A. 1970 Supp. 22-4508) The "Act" attempted to provide guidelines whereby a Kansas examining court could determine the indigency of any defendant who stood before it. The particular portion of the "Act" in question here relates to legislative authorization for the state to attempt to recover back from those indigents on whose behalf money was expended, the sums so expended.

In connection with the expenditure of funds for attorney's fees in court appointment cases, a Board of Supervisors including, *inter alia*, the state judicial administrator and a representative of the state Supreme Court, was es-

established to review schedules for fee payment and approval of individual expense items. See K.S.A. 1970 Supp. 22-4514. Although the Board originally attempted to compensate court appointed lawyers at rates relatively close to local bar minimum, that was soon found to be impossible and rates were reduced to the point that currently they are approximately one-half of local bar minimum rates with a maximum of \$500 per normal case. The monetary problem became so acute in Kansas that not only were the compensation rates for court appointed attorneys gradually reduced to the present level, but there was even the strong possibility during the 1971 Session of the Kansas Legislature that this type of expense would no longer be borne by the state.

The recovery of monies from persons on whose behalf defense expenses were paid was authorized and made enforceable in a number of ways by statute. See K.S.A. 22-4513. The opinion of the district court in this case made no distinction between the various methods of recoupment, but declared generally that any statute attempting to allow recovery of attorney's fees as does K.S.A. 22-4513 in any manner would violate an indigent defendant's right to counsel under the Sixth and Fourteenth Amendments.

The question thus presented is extremely important to the administration of the criminal justice system in the State of Kansas because the broad sweep of the district court's decision appears to prohibit any attempt to recover back from an indigent any money expended on his behalf, regardless of the manner or method by which that attempt is made. K.S.A. 22-4513, for example, allows a Kansas court in which a judgment against the former indigent defendant for recoupment exists to do such things for enforcement of the judgment as setting aside of conveyances of land prior to appointment of an attorney, or if

the judgment against the indigent defendant is kept alive under the Kansas dormant judgment and revival statutes (See K.S.A. 60-2403, 2404), to execute upon that judgment should the once indigent defendant suddenly find himself in possession of property. The district court's decision in this case has done more than declare K.S.A. 1970 Supp. 22-4513 unconstitutional as it is applied to Mr. Strange, it has made an across-the-board pronouncement that any attempt to recover back monies expended for attorney's fees is unconstitutional. The district court's opinion must conclude that any attempt on the part of any state in any way to recoup monies expended for the defense in an indigent case from the indigent defendant after the defense is completed is an unconstitutional impediment of the right to counsel. A determination of that issue will substantially affect the procedural administration of the right to counsel in a number of states, including Kansas. A number of states provide a procedure whereby monies expended on behalf of an indigent defendant can be recovered from that defendant at a later date. See Ala. Code, Title 15, § 318(12); Fla. Stat. Ann. (1971 Supp.) 27.56; N. J. Stat. Ann. (1971 Supp.) 2A: 158A-16; N.C. Stat. Ann. 7a-455(b); N.D. Cert. Code Ann. (1970 Supp.) 29-07-01.1; S.C. Code Ann. (1970 Supp.) § 19 17-283; Va. Code Ann. (1970 Supp.) § 14-1-184; W. Va. Code Ann. (1955) § 6190; Wisc. Stat. Ann. (1970 Supp.) § 256.66. See also Hawaii Rev. Stat. (1970 Supp.) § 611-6. Reimbursement is authorized under the federal Criminal Justice Act. See 18 U.S.C.A. § 3006A (f). Presumably, those methods, although the procedure involved in each varies from state to state, all are unconstitutional if the reasoning of the district court in this case is upheld. If the district court in this case is correct, in addition to that effect, the State of Kansas or any other state would be ill advised to attempt to find any way of recovering monies from indigent defendants after their defense is completed.

In the fiscal year 1970, in the State of Kansas alone, over six hundred thousand dollars (\$600,000.00) was expended to compensate court-appointed attorneys and provide other defense expenditures. In many cases, the State of Kansas will not be able to recover any money from the person on whose behalf the expenditure is made. However, that does not mean that if the Legislature of the State of Kansas desires to adopt the policy of at least attempting to collect money where feasible, the state should not be allowed to do so insofar as the United States Constitution is not contravened.

The question presented herein is further substantial because the effect of the district court's decision in its broad sense with its broad-sweeping prohibition upon any attempt to recover monies expended on behalf of indigent defendants, is to encourage those who face criminal prosecution to place themselves in a position where they would be technically indigent under the indigent qualification statute (see K.S.A. 1970 Supp. 4504) for the purposes of their criminal trial, only to become more prosperous after that trial and the defense is completed. The effect of the district court's decision in this case is to say to those who are truly indigent, or who can make themselves become indigent temporarily, you receive free counsel at the expense of the State. This means the indigent defendant would automatically receive counsel and the state would have no opportunity to attempt to collect money back expended for counsel fees. The effect of the district court's decision in this case is to treat the indigent unequally. The district court has concluded that the effect of a Kansas statute is to place a chilling effect on the right to counsel. If in fact, either the fear of having to pay back the monies expended on your behalf, or the fear in the first place of having to raise money for defense does have a chilling effect, the decision in this case treats the in-

igent defendants among all other defendants in a far superior and unequal position. The State of Kansas is not asking that anyone's constitutional right to counsel be chilled. We think our Legislature has for years attempted to protect the constitutional rights of indigent defendants. However, we are asserting that once public monies are expended for individual persons, the state be allowed the opportunity to recover those monies in an appropriate case.

We make this request, keeping in mind the words of Mr. Justice Stewart, when he said for a majority of the Court:

"We may assume that a State can validly provide for recoupment of the cost of appeals from those who later become financially able to pay." *Rinaldi v. Yeager*, 384 U.S. 305, 311 (1966).

We submit the question presented by this appeal is substantial, that this court does have jurisdiction to entertain this direct appeal, and on the merits that the decision of the District Court should be reversed.

Respectfully submitted,

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